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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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# No. 641

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HERMAN BECKER,

*Petitioner,*

*vs.*

COMMONWEALTH OF VIRGINIA,

*Respondent*

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**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA, AND BRIEF IN SUPPORT THEREOF.**

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*To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Petitioner seeks the review of a judgment of the Supreme Court of Appeals of Virginia, which presents a substantial Federal Constitutional question.

The Supreme Court of Appeals of Virginia denied a writ of error and supersedeas to the petitioner, Herman Becker, the effect of which was to affirm the judgment of the Corporation Court of the City of Norfolk, Virginia.

The title of the case below is:

Herman Becker v. Commonwealth of Virginia.

The case has not been officially reported.

## Basis on Which It Is Contended That This Court Has Jurisdiction

Jurisdiction exists by virtue of Title 28, United States Code Annotated, Section 1257, Sub-section 3; 62 Statutes 992.

The Supreme Court of Appeals of Virginia, being the court of last resort of said State, rendered its final judgment in this case wherein a right, privilege and immunity under the Constitution of the United States was especially set up and claimed by the petitioner, to-wit, freedom from unreasonable search and seizure by virtue of the Fourth and Fourteenth Amendments to the Constitution of the United States (R. 2, 3, 6, 20, 23, 50).

## Date of Judgment

The Supreme Court of Appeals of Virginia rendered its final judgment on January 11, 1949 (R. 50).

The Petition for Certiorari was filed on March 11, 1949.

## Constitutional Question Presented

The question presented is whether or not an unlawful search and seizure by State officers, acting under State authority, and the subsequent use of the evidence thereby obtained against the defendant, constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

## Specification of Errors

The Supreme Court of Appeals of Virginia erred:

1. In affirming the conviction of the petitioner.

2. In holding the evidence taken from the accused without a search warrant was admissible against the petitioner.

3. In holding that such unlawful search and seizure, and the use of evidence so obtained, was not in violation of the protection afforded by the Fourth and Fourteenth Amendments to the Constitution of the United States.

**Reasons Relied On for Allowance of Certiorari**

1. The judgment of the Virginia Supreme Court, sustaining the conviction of the petitioner, decided an important question of Federal law which has not heretofore been determined by this court, to-wit: Whether the protection afforded by the Fourth Amendment against unreasonable search and seizure comes under the purview of the Fourteenth Amendment to the Constitution, guaranteeing due process of law to the citizens of the United States.

2. The conviction of petitioner by use of unlawful evidence deprived him of his liberty and property without due process of law, contrary to the provisions of the Fourth and Fourteenth Amendments to the Constitution of the United States.

3. There is diversity of decisions among the State courts as to whether or not the use of evidence unlawfully seized constitutes a violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, and a decision of this court is required for uniformity of decisions.

**Manner in Which the Constitutional Question Was Raised**

At the inception of the trial, motion was made by the defendant to require the Commonwealth to restore to the accused the evidence consisting of a bank deposit slip with words and figures written on it (Ex. 6; R. 20, 27) and a memorandum book with names and telephone numbers

(Ex. 5; R. 20, 26) unlawfully taken from his person in violation of the Constitutional rights of the prisoner (R. 20, 21).

Mr. Willcox: "If your Honor please, this accused was the occupant of an apartment in the City of Norfolk which the officers visited on the occasion in question. Before he was under arrest they took out of his pockets a bank deposit slip with words and figures written thereon, and a memorandum book with some names and telephone numbers in it. We submit that was an illegal search; they had no right to take it, and we move the Commonwealth be required to restore them to the accused."

The Court: "What position does the Commonwealth take?"

Mr. Bullock (Commonwealth's Attorney): "It is immaterial, sir, for the purpose of our evidence, whether taken legally or illegally. If they were taken illegally and the defendant's rights have been trespassed upon, he has his rights against the person who did it, but we have the right to use them as evidence however taken."

Mr. Willcox: "We submit it was a violation of the constitutional rights of the prisoner and the evidence thus obtained is not admissible." (R. 20.)

The motion was overruled, objection was made thereto, and exception noted (R. 21). Objection was also made to the introduction of the documents in evidence which was overruled and exception taken on the same grounds (R. 21).

Mr. Willcox: "And may we now record an objection to the introduction of those documents in evidence, and except, on the same grounds?"

The Court: "Yes, except on the same grounds."

Mr. Willcox: "As if done at the time of the trial."
The Court: "Yes." (R. 21.)

At the conclusion of the testimony of the Commonwealth, defendant moved to strike the evidence and to exclude therefrom all the exhibits, including those taken from the accused by illegal search. Both motions were overruled to which exceptions were taken on the "grounds stated" (R. 40).

At the conclusion of the trial, motion was made to set aside the verdict of guilty and grant the defendant a new trial on the ground that it was contrary to the law and evidence, which motion was overruled, and the defendant excepted (R. 49).

The errors complained of were duly assigned in the Petition for a Writ to the Supreme Court of Appeals of Virginia (R. 2-3) and the ground stated therefor was the violation of the "Fourth Amendment to the Constitution of the United States, and the introduction in evidence of the articles so obtained violated the Fourteenth Amendment of the Constitution . . . The accused was convicted without due process of law" (R. 6, 7). The Supreme Court denied a writ of error (R. 50).

It will be noted that the motions made in the trial court invoked the Constitutional rights of the petitioner, but did not refer especially to the Fourth and Fourteenth Amendments. However, those Amendments were specifically referred to in the proceedings on appeal to the Supreme Court of Appeals of Virginia (R. 6).

It was made clear to the court that petitioner was claiming Constitutional immunity from unreasonable search and seizure, and that his claim was a matter of substance (R. 20, 21).

The question here is a substantial one since it involves a fundamental Constitutional right of the petitioner to be free

from unreasonable search and seizure; the question is one of substance since his conviction was based solely on evidence seized without a search warrant; and certiorari has been granted by this Court in two cases involving a similar question. *Wolf* v. *Colorado,* October Term, 1948, No. 17 and No. 18.

**Statement of the Case**

The petitioner is charged with a criminal offense in the violation of Section 4682 of the Virginia Code, to-wit:

"It shall be unlawful for any person or persons or associations of persons, corporation, or corporations, to occupy any room, shed, tenement, or building, or any part thereof, or to occupy any place upon any grounds with books, apparatus, or paraphernalia for the purpose of recording or registering bets or wagers or of selling or making books, pools, or mutuels upon the result of any game of baseball, football, or any trial of speed or power of endurance of animals or beasts."

On June 14, 1948, police officers of the City of Norfolk came to the apartment occupied by the petitioner, rang the bell, and were admitted. They had no search warrant. There were three other persons in the room with the accused. The apartment was sparsely furnished, and a fire was burning in the stove. The officers put out the fire and recovered from the stove pieces of charred paper and newspapers (Ex. 3 and 4; R. 24-26). The officers seized these papers along with a pad, rubber bands, paper clips and old newspapers (Ex. 7, 8, 9 and 10; R. 27-28).

The officers took from the person of the petitioner, prior to his arrest (R. 20), a memorandum book with telephone numbers (Ex. 5; R. 26), a sheet of paper with "personal listings of certain amounts of money of various people" (Ex. 6; R. 27), and a small piece of paper with information pertaining to horse racing: "It shows a horse's name and the

index number. This index number applies to these pieces of papers . . . he had in his pocket (Ex. 8; R. 27).

The officers heard no gambling and saw no money (R. 33), and did not arrest the other occupants of the premises (R. 37).

**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI**

The first eight Articles of the Amendments to the Constitution of the United States refer to powers exercised by the Government of the United States and not to those of the several States. *National Safe Deposit Company* v. *Illinois*, 232 U. S. 58; *Ohio ex Rel. Lloyd* v. *Dollison*, 194 U. S. 445.

The Fourteenth Amendment guarantees that a State shall not deprive any person of life, liberty or property without due process of law.

This Court has held that even though the Bill of Rights applies only to the Federal government, yet the violation by a State of the provisions of a particular Amendment "found to be implicit in the concept of ordered liberty" may amount to a deprivation of due process of law under the Fourteenth Amendment. *Palko* v. *Connecticut*, 302 U. S. 319, 324.

All of the rights guaranteed by the First Amendment are held to be protected by the Fourteenth Amendment.

Freedom of Religion. *West Virginia State Bd. of Educ.* v. *Barnett*, 319 U. S. 624; *McCollum* v. *Board of Education*, — U. S. —, 92 L. Ed. 451.

Freedom of Speech and Press.

"The word 'liberty' contained in that (14th) Amendment embodies not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well." *Grosjean* v. *American Press Co.*, 297 U. S. 233.

Peaceful assemblage.

"For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, principles which the Fourteenth Amendment embodies in

the general terms of its due process clause." *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowery*, 341 U. S. 242, 259.

The right to counsel under the Sixth Amendment.

"One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding with the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation. . . . Plainly as appears from the foregoing, this test, as thus qualified, has not been met in the present case. . . . To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard'." *Powell* v. *Alabama*, 287 U. S. 45, 65; *Marino* v. *Ragan*, 332 U. S. 561; *Townsend* v. *Burke*, 334 U. S. 736.

A confession coerced from the accused is a violation of due process of law. *Haley* v. *Ohio*, — U. S. —, 92 L. Ed. 239.

On the other hand it has been held that the Fourteenth Amendment is not applicable:

Where self-incriminating evidence was used against the accused by the state (5th Amendment). *Adamson* v. *California*, 332 U. S. 46.

Where comment was made by the prosecution on the failure of the accused to testify (5th Amendment). *Twining* v. *New Jersey*, 211 U. S. 78.

Where the criminal action is based on information rather than presentment or indictment (5th Amendment). *Hurtado* v. *California*, 110 U. S. 516.

To questions involving modification or abolition of jury trials (6th Amendment). *Walker* v. *Sauvinet*, 92 U. S. 90.

To statutes permitting appeals by the state in criminal cases. *Palko* v. *Connecticut*, *supra*.

In the last mentioned case this Court said, referring to the cases holding that there had been a violation of due process:

"In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."

As to the cases holding that the Fourteenth Amendment did not apply, the Court said:

"The line of decision may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and consciences of our people as to be ranked as a fundamental'. . . . What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. . . . This too might be lost, and justice still be done. . . The exclusion of these immunities and privileges from the

privileges and immunities protected against the action of the states has not been arbitrary or casual. *It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.*" (Italics added)

Therefore the sole question to be determined in the case at bar is "which side of the line" does the Fourth Amendment against search and seizure fall.

This question was presented to this Court in the case of *Adams* v. *New York*, 192 U. S. 585, where it was stated:

"We do not feel called upon to discuss the contention that the 14th Amendment has made the provisions of the 4th and 5th Amendments to the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures. . . privileges and immunities of which they may not be deprived by the action of the states. An examination of this record convinces us that there has been no violation of these constitutional restrictions."

However, subsequently in the case of *Weeks* v. *United States*, 232 U. S. 383, this Court held, in a Federal prosecution, that evidence illegally seized and used at the trial, constituted a violation of the Fourth Amendment, and referring to the Adams case, stated:

> "It is therefore evident that the Adams Case affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant, and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes."

The cases of *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, and *Hammond Packing Co.* v. *Arkansas*, 212 U. S.

322, raised the issue herein presented, but are not in point.

The decisions indicate that there are certain fundamental rules required to bring the Fourth Amendment within the protection afforded by the Fourteenth Amendment:

(1) The right secured must "affect the very essence of constitutional liberty and security" and must be a basic right established by settled usuages. *Boyd* v. *United States*, 115 U. S. 616; *Twining* v. *New Jersy, supra; Powell* v. *Alabama, supra.*

The sanction against unlawful search and seizure derives from the Magna Charta. *Twining* v. *New Jersey, supra,* (p. 100.)

In *Boyd* v. *United States, supra,* the Court, after giving an historical statement of the subject, referred to Lord Camden's judgment in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, and stated:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

This Court has left no doubt in its recent decisions that the Fourth Amendment confers a fundamental and basic right.

"We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment." *United States* v. *Di Re,* 332 U. S. 581.

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Johnson* v. *United States,* 333 U. S. 10.

"Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant." *McDonald* v. *United States,* — U. S. —, 93 L. Ed. 144.

"But we cannot agree that the seizure of the contraband property was made in conformity with the require-

ments of the Fourth Amendment. It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable . . . To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement." *Trupiano* v. *United States*, 334 U. S. 699.

(2) The right must be substantive rather than procedural.

It is in this respect that the State Court erred. The Commonwealth's Attorney relied on the case of *Hall* v. *Commonwealth*, 138 Va. 727, 121 S. E. 154. "It is immaterial, sir, for the purpose of our evidence, whether taken legally or illegally. If they were taken illegally and the defendant's rights have been trespassed upon, he has his rights against the person who did it, but we have the right to use them as evidence however taken" (R. 20).

The Court stated in *Hall* v. *Commonwealth, supra:*

"The admissibility of evidence is not affected by the illegality of the means by which it has been obtained, unless it appear that the defendant has been compelled himself to give or produce it, as where a confession obtained by duress is offered in evidence. And where evidence is acquired by an illegal search and seizure it cannot be said that the defendant has been himself compelled to give or produce it.

"Where the evidence produced is competent and pertinent to the issue, the court will not stop the trial of a case to investigate the means by which it was procured. Such a course would involve the trial of an outside issue, either collateral or independent, and tend to confuse the issues and create unnecessary delay in the trial of the principal case. See authorities hereafter cited herein. It would mean that the court must pause in the trial of a criminal case to decide property rights

between wrong-doers. This the court will not do, especially where the property involved is contraband and forfeited to the Commonwealth, and not lawfully in the possession of the party complaining. The policy of the law in such cases is to refuse relief and leave the parties where it finds them . . .

"*We concur with the courts of all jurisdictions that the constitutional guaranty that the citizens shall be protected against illegal searches and seizures should be rigidly enforced.* (Italics added) But the violation of this right is complete when the search is made and the goods taken into possession, and the subsequent use of the articles as evidence is no part of such violation.

"In the admission of the testimony illegally obtained, the court in no way condones the offense of the officer, nor relieves him from proper punishment, but refuses to allow the defendant to escape just punishment for his violation of the law because the officer is also guilty of its violation. In so holding we do the defendant no injustice. She can protect the sanctity of her home, without denying the State the right to use pertinent evidence, by applying remedies which the law provides.

"The Virginia search and seizure act of 1920 (Acts 1920, c. 345) was manifestly passed to protect and enforce the rights of the citizens guaranteed to them by article 10 of the Virginia Bill of Rights. Section 4 of the act provides that 'any officer or other persons searching any house, place, etc., otherwise than by virtue of and under a search warrant (provided for in the act) shall be guilty of a misdemeanor, and be fined not less than fifty dollars nor more than five hundred dollars or be confined in jail not less than one month nor more than six months, or both, in the discretion of the justice, court or jury trying the same. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages.' Had the legislature deemed further penalties necessary for the protection of the citizens against illegal searches and seizures, it would doubtless have prescribed them. Having failed

> to do so, the duty does not rest upon the courts to inflict additional penalties, and one accused of crime in this jurisdiction cannot be heard to contend that property seized under an illegal search warrant cannot be used as evidence against him."

This reasoning certainly has no basis where, as in the instant case, a demand for the return of the evidence is made at the inception of the trial, since there was no occasion to "stop the trial . . . to investigate the means." *Weeks* v. *United States, supra.*

However, the entire reasoning of the case, and that of the authorities upon which it relies, is inherently illogical.

The Court states that the redress of the accused is in an action for damages against the officer violating the law.

What good is it to an accused who has been condemned to execution or sentenced to confinement in the penitentiary or jail, on illegal evidence, to have a right to sue the policeman or sheriff? What sort of redress is this for the violation of his constitutional rights? The Court's statement "In so holding we do the defendant no injustice" is not compatible with the dictates of common justice.

The rule of procedure invoked by the Court, whatever may be its worth under other circumstances, does not apply where there has been an invasion of a constitutional guaranty. *Olmstead* v. *United States,* 277 U. S. 438, 467.

The Court's statement that the Virginia legislature could have provided further means for the protection of its citizens against illegal searches and seizures, is met with the reply that the legislature has no power to change or modify a constitutional provision.

The same legal question arose in *Hall* v. *Commonwealth,* 143 Va. 554, 130 S. E. 416, (a different case from the one above cited) in which Judge Burks dissented:

"While there is much conflict of authority on the admissibility of evidence obtained by an illegal search and seizure, I think the holding of the Supreme Court of the United States should be followed. I do not think that the guilt or innocence of one accused of crime should depend on the court in which he is tried. The facts being admitted, the law determines the guilt or the innocence of the accused. The law to be administered is not a local statute, but the common law rule of evidence. This cannot be one thing in one court and another thing in another court. Upon an admitted state of facts, the accused cannot be guilty on one side of the hall and not guilty on the other. The law presents no such anomaly. One or the other of the courts must be wrong, and where there is conflict of authority among the State courts on a question of law common to all the States, and the question has been determined by the unanimous opinion of the Supreme Court of the United States, I think the decision of the court should be followed."

His opinion continues with a reference to the statements of this Court in the case of *Agnello* v. *United States,* 269 U. S. 70, then recently decided, and quotes the language from *Gouled* v. *United States,* 255 U. S. 298, "That a rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

(3) The right must be "implicit in the concept of ordered liberty." *Palko* v. *Connecticut, supra.*

The adjective "ordered" is aptly used. Here it means "conformity to law or decorum: rule of law or proper authority." (Webster)

The right of a citizen to privacy and freedom from unreasonable search and seizure is one of the long established bulwarks of Freedom. (See historical analysis in *Boyd* v. *United States, supra.*)

> "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties is a delusion." *Di Re* v. *United States, supra,* quoting Judge Learned Hand.

In the instant case, the police officers took from the accused, without a search warrant, and without justification for their failure to secure one, newspapers which they testified contained horse-racing information. The next time, perhaps an over-zealous policeman or unscrupulous official, might seize newspapers that contain in their view "suspect" information. (The quote is from the dissenting opinion of J. Frankfurter in *Harris* v. *United States,* 331 U. S. 145, 163.)

> "I cannot give legal sanction to what was done in this case without accepting the implications of such a decision for the future, implications which portend serious threats against precious aspects of our traditional freedom." *Harris* v. *United States, supra,* 156.

It is submitted that a Writ of Certiorari and Stay of Execution be issued in this case so that the important constitutional question here raised may be fully presented and argued before this Court.

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# CERTIORARI

# DENIED